

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOLENE R. MEREDITH, o/b/o)	
D.H., a minor child,)	No. CV-09-0384-CI
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
v.)	AND GRANTING DEFENDANT'S
)	MOTION FOR SUMMARY JUDGMENT
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 18.) Jolene Meredith, mother of minor child, D.H., protectively filed for Supplemental Security Income (SSI) on behalf of D.H. Attorney Maureen J. Rosette represents the minor child (Plaintiff); Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the transcript of proceedings and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry for Defendant.

JURISDICTION

On January 16, 2007, Jolene Meredith protectively filed an application for Supplemental Security Income (SSI) benefits on behalf of Plaintiff alleging disability due to a learning disorder,

1 with an alleged onset date of September 1, 2006. (Tr. 13, 54, 99,
2 101.) Plaintiff was a school age child at the time the application
3 was filed. (Tr. 15.) The application was denied initially and on
4 reconsideration. After an administrative hearing at which
5 Plaintiff's mother and medical expert R. Thomas McKnight, Ph.D.,
6 testified, the administrative law judge (ALJ), R. S. Chester, denied
7 benefits on September 23, 2008. (Tr. 26-53, 12-24.) Plaintiff, who
8 was present during the hearing, was represented by counsel. (Tr.
9 28.) A review was requested, and the Appeals Council denied review
10 on November 12, 2009. (Tr. 1-5, 13-24.) At that time, the ALJ's
11 decision became the final decision of the Commissioner. This appeal
12 followed pursuant to 42 U.S.C. § 405(g).

13 **SEQUENTIAL EVALUATION FOR CHILDREN**

14 On August 22, 1996, Congress passed the Personal Responsibility
15 and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193,
16 110 Stat. 105, which amended 42 U.S.C. § 1382c(a)(3). Under this
17 law, a child under the age of eighteen is considered disabled for
18 the purposes of SSI benefits if "that individual has a medically
19 determinable physical or mental impairment, which results in marked
20 and severe functional limitations, and which can be expected to
21 result in death or which has lasted or can be expected to last for
22 a continuous period of not less than 12 months." 42 U.S.C. §
23 1382c(a)(3)(C)(I) (2003).

24 Social Security regulations (Regulations) provide a three-step
25 process in determining whether a child is disabled. First, the ALJ
26 must determine whether the child is engaged in substantial gainful
27 activity. 20 C.F.R. § 416.924(a). If the child is not engaged in
28 substantial gainful activity, then the analysis proceeds to step

1 two. Step two requires the ALJ to determine whether the child's
2 impairment or combination of impairments is severe. *Id.* The child
3 will not be found to have a severe impairment if it constitutes a
4 "slight abnormality or combination of slight abnormalities that
5 causes no more than minimal functional limitations." 20 C.F.R. §
6 416.924(c) If, however, there is a finding of severe impairment,
7 the analysis proceeds to the final step which requires the ALJ to
8 determine whether the impairment or combination of impairments
9 "meets, medically equals or functionally equals" the severity of a
10 set of criteria for an impairment in the listings. 20 C.F.R. §
11 416.924(d).

12 The Regulations explain that an impairment will be found to be
13 functionally equivalent to a listed impairment if it results in
14 extreme limitations in one area of functioning or marked limitations
15 in two areas. 20 C.F.R. § 416.926a(a). To determine functional
16 equivalence, the following six domains, or broad areas of
17 functioning, are utilized: acquiring and using information,
18 attending and completing tasks, interacting and relating with
19 others, moving about and manipulating objects, caring for yourself,
20 and health and physical well-being. 20 C.F.R. § 416.926a(b).
21 Limitations in functioning must result from the child's medically
22 determinable impairments. 20 C.F.R. § 416.924a(a).

23 STANDARD OF REVIEW

24 Congress has provided a limited scope of judicial review of the
25 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
26 the Commissioner's decision, made through an ALJ, when the
27 determination is not based on legal error and is supported by
28 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th

1 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
2 "The [Commissioner's] determination that a plaintiff is not disabled
3 will be upheld if the findings of fact are supported by substantial
4 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
5 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a
6 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
7 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
8 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of*
9 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988).
10 Substantial evidence "means such evidence as a reasonable mind might
11 accept as adequate to support a conclusion." *Richardson v. Perales*,
12 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences
13 and conclusions as the [Commissioner] may reasonably draw from the
14 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,
15 293 (9th Cir. 1965). On review, the court considers the record as
16 a whole, not just the evidence supporting the decision of the
17 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

18 It is the role of the trier of fact, not this court, to resolve
19 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
20 supports more than one rational interpretation, the court may not
21 substitute its judgment for that of the Commissioner. *Tackett*, 180
22 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
23 Nevertheless, a decision supported by substantial evidence will
24 still be set aside if the proper legal standards were not applied in
25 weighing the evidence and making the decision. *Browner v. Secretary*
26 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).
27 Thus, if there is substantial evidence to support the administrative
28 findings, or if there is conflicting evidence that will support a

1 finding of either disability or nondisability, the finding of the
2 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
3 1230 (9th Cir. 1987).

4 STATEMENT OF FACTS

5 Plaintiff was entering fourth grade at the time of the hearing.
6 (Tr. 40.) He had attended elementary school in the Spokane School
7 District, where he was in general education classrooms with one hour
8 per day of special education services. (Tr. 41, 107.) In 2007, his
9 special education case manager reported Plaintiff received
10 additional assistance in the general education classroom but
11 exhibited no behavior problems. (Tr. 114.) Plaintiff was one year
12 behind in his reading and writing levels, and six months behind in
13 math, but was considered pleasant, cooperative, and capable of work
14 within a classroom setting at the school (*Id.*; Tr. 116, 149.)
15 Plaintiff's third grade report card indicated he was doing
16 satisfactory work in most subjects, but needed assistance in reading
17 and writing, and some areas of math. (Tr. 132.) Plaintiff had not
18 failed any grade levels.

19 At the hearing, Plaintiff's mother testified Plaintiff got
20 along well with the other children at school, but had problems
21 completing homework, staying focused on school work and household
22 chores, and keeping himself clean. (Tr. 42-43, 44-46.) She
23 reported he also complained of stomach problems at school and had
24 missed several days at school due to stomach pain which she thought
25 was related to stress after his grandfather's recent death. (Tr. 46-
26 47.) She reported he was improving academically (Tr. 41), and had
27 started counseling shortly after his grandfather died in February
28 2007. (Tr. 48.)

ADMINISTRATIVE DECISION

ALJ Chester found Plaintiff was a school-age child at the time the application for benefits was filed and at the time of the hearing. (Tr. 15.) At step one, the ALJ found Plaintiff had not engaged in substantial gainful employment at any time relevant to the proceedings. (Tr. 16.) At step two, he found the child had the severe impairment of a learning disorder. (*Id.*) Plaintiff's reactive airway disease and ear infections were found to be not severe. (Tr. 17-18.) At step three, the ALJ determined Plaintiff did not have an impairment or combination of impairments that medically met or equaled a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listing), or functionally equaled a Listing, as defined in 20 C.F.R. §§ 416.924a(d), .926a. (Tr. 18.) Regarding the six domains of functioning assessed at step three, the ALJ determined Plaintiff did not have an "extreme" limitation in any domain of function, or "marked" limitations in any two domains. (Tr. 20-24.) The ALJ concluded Plaintiff's impairment did not functionally equal a Listing and, therefore, he was not disabled since the date the application was filed. (Tr. 24.)

ISSUES

The question presented is whether there is substantial evidence in the record to support the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff asserts the ALJ erred when: (1) he found the minor's impairment did not functionally equal a Listing; (2) he failed to give proper weight to the testimony of the mother and opinions from Plaintiff's teachers; and (3) he improperly relied on medical expert testimony that Plaintiff had "less than marked" limitations in the

1 domains of Acquiring and Learning Information and Attending to and
2 Completing Tasks. (Ct. Rec. 14 at 4-5.)

3 DISCUSSION

4 A. Evaluation of Child Disability Cases

5 Where a child's impairment does not meet or equal one of the
6 Listings, his impairments are evaluated under a functional
7 equivalency standard. 20 C.F.R. § 416.926a. The ALJ is responsible
8 for deciding functional equivalence after consideration of all
9 evidence submitted. 20 C.F.R. § 416.926a(n). The Regulations list
10 the information and factors that will be considered in determining
11 whether a child's impairment functionally equals a Listing. 20
12 C.F.R. § 416.926a; 20 C.F.R. § 416.924a, .924b. Standardized
13 testing provides important information about deficits in development
14 and functioning in terms of standard deviations and percentiles. 20
15 C.F.R. § 416.926a(e)(1)(ii), (e)(2)(iii). However, no single
16 piece of evidence is considered in isolation. Test scores alone can
17 not establish a "marked" or "extreme" limitation in a domain. 20
18 C.F.R. §§ 416.924a(a)(1)(ii), .926a(e)(4). The Commissioner must
19 consider test scores together with reports and observations of
20 school personnel and others. 20 C.F.R. § 416.924a(a); 20 C.F.R.
21 § 416.926a(e)(4)(ii). In assessing functional equivalence, the
22 ALJ also considers how much extra help the child needs, how
23 independent he is, how he functions in school, and the effects of
24 treatment, if any. 20 C.F.R. § 416.926a(b). In evaluating this
25 type of information, the ALJ will consider how the child performs
26 activities as compared to other children his age who do not have
27 impairments. 20 C.F.R. § 416.926a(b). This information comes from
28 examining and non-examining medical sources as well as "other

sources," such as parents, teachers, case managers, therapists, and other non-medical sources who have regular contact with the child. See, e.g., 20 C.F.R. § 416.913 (c)(3),(d); *Social Security Ruling* (SSR) 98-1p, IV.B. (*Sources of Evidence*).

Citing *Social Security Ruling* 06-03p, Plaintiff argues the ALJ should have given more weight to the opinions and observations of Plaintiff's mother and school personnel, who completed a Teacher Questionnaire in 2007. He contends their non-medical opinions establish "marked" limitations in the domains of Acquiring and Using Information and Attending and Completing Tasks. (Ct. Rec. 20 at 9-11.) He further contends substantial evidence does not support the non-examining medical expert's opinion that Plaintiff's impairments are less than marked in these two domains. (*Id.* at 11.) For the reasons discussed *infra*, these arguments are not persuasive.

B. Medical Expert Evaluation of the Case

Where, as here, the record includes various reports from individual sources, the ALJ is required to consult with a "qualified specialist" to evaluate the case in its entirety. *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1014 (9th Cir. 2003) (*citing* 42 U.S.C. 1382c(a)(3)(I))(reliance on an individual evaluation or report is inadequate to meet statutory requirement that a child's case be evaluated in its entirety). The analysis and opinion of a qualified psychologist selected by the ALJ assists the Commissioner in his mandated responsibility to evaluate a child disability case in its entirety. 20 C.F.R. § 416.927(d)(1). In this case, the evidence includes results from psychological and intellectual functioning tests, together with reports from school psychologists, teachers and special education specialists. Evaluation of the case

1 as a whole by a qualified medical expert is critical to the
2 adjudicator's longitudinal understanding of child's impairment and
3 resulting limitations. See *Howard*, 341 F.3d at 1014; *Andrews v.*
4 *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

5 The ALJ properly obtained a comprehensive case evaluation from
6 Dr. McKnight, who has a Ph.D. in psychology, a M.Ed. in Education,
7 and a bachelor's degree in speech and special education. (Tr. 74.)
8 In addition, Dr. McKnight testified he is board certified in school
9 psychology with a specialty in the diagnosis and assessment of
10 mental disorders. (Tr. 34.) Dr. McKnight's credentials qualify him
11 as a specialist for purposes of the mandated case evaluation in a
12 child disability case. *Id.* Based on his review and interpretation
13 of the entire record, Dr. McKnight concluded Plaintiff did not
14 functionally meet a listing. (Tr. 36-39.) De novo review reveals
15 his testimony is supported by substantial evidence.

16 **1. Acquiring and Using Information Domain**

17 As testified by Dr. McKnight, the child's scores the Stanford-
18 Binet Intelligence Scale-IV administered in May 2006 reflect no
19 deficit in overall intellectual functioning. (Tr. 145.) Scores on
20 the Wechsler's Individual Achievement Test-II showed limitations in
21 solving arithmetic problems, although Plaintiff demonstrated he
22 could understand the math reasoning. (Tr. 35, 146.) Dr. McKnight
23 reported scores from neither test were two standard deviations below
24 the mean. (Tr. 17, 35-36, 145.) As found by the ALJ in his
25 assessment of the six domains, and supported by Dr. McKnight's
26 testimony, the standardized test scores do not establish a "marked"
27 or "severe" limitation in the Acquiring and Using information
28 domain. (Tr. 17, 20, 35-36.) See 20 C.F.R. § 416.926a(e),(g)(iv).

1 In addition to test scores, the ALJ properly considered school
2 reports that recommended Plaintiff receive special education
3 services one hour a day to address his problems in the areas of
4 reading, writing, and solving math problems, as well as progress
5 reports and Individualized Educational Program (IEP) reports. (Tr.
6 20; see, e.g., 146-52, 136-40.) The ALJ's summary of the evidence,
7 Dr. McKnight's interpretation of the test scores, and reports from
8 school personnel over the years support the ALJ's finding of "less
9 than marked" limitations in the Acquiring and Using Information
10 domain.

11 For example, in addition to the first grade testing, the record
12 includes reports from second and third grade teachers. The
13 longitudinal record shows that Plaintiff's special education case
14 manager, Karen Wuesthoff, assessed five "serious problems" and one
15 "very serious problem" in this domain in a March 2007 Teacher
16 Questionnaire prepared for disability benefits purposes. (Tr. 108-
17 09.) Plaintiff asserts these opinions, which were not rejected by
18 the ALJ, are substantial evidence to support a finding of functional
19 equivalence.

20 Plaintiff is correct that, in the evaluation of child
21 disability cases, the opinions of a child's teachers are highly
22 probative. As is the case with all "other source" or lay testimony,
23 the educators' opinions must be considered and the weight given to
24 them explained. *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d
25 1050, 1053 (9th Cir. 2006). If their opinions are rejected, the ALJ
26 must give specific "germane" reasons for doing so. *Id.* Further,
27 the Commissioner advises in his policy ruling that the opinions
28 "other sources" such as teachers, who have had extended contact with

1 a claimant, may be used to reject the opinions of a treating or
2 examining medical source, if their opinions are supported by other
3 medical evidence in the record. *Social Security Ruling (SSR)* 06-
4 03p.

5 Although "other source" opinions may, under certain
6 circumstances described in *SSR* 06-03p, be given more weight than a
7 medical opinion, non-medical testimony can never establish a
8 diagnosis or disability absent corroborating competent medical
9 evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
10 Likewise, "other source" opinions alone are insufficient to
11 establish functional equivalence, an administrative finding that is
12 reserved to the Commissioner. 20 C.F.R. §§ 416.927, 416.926a (e);
13 *Jamerson v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997); *SSR* 06-03p.

14 Here, the ALJ properly considered the Teacher Questionnaire,
15 noting that in the narrative portion of the Questionnaire, the
16 teachers specifically commented Plaintiff was behind one year for
17 reading and writing, and six months for math. Nonetheless, as found
18 by the ALJ, they opined that, despite his problems, Plaintiff was
19 "fully capable of functioning within a classroom setting and school
20 environment." (Tr. 16, 114.)

21 By March 2008, Plaintiff's IEP reports indicated time devoted
22 to special education services in the areas of reading and writing
23 had not increased, and Plaintiff was requiring little, if any,
24 classroom support for math. (Tr. 139-40.) Ms. Wuesthoff, who had
25 followed Plaintiff from the time he was in first grade, noted in the
26 2008 IEP that Plaintiff was "very capable" of doing classroom work;
27 she indicated his problem in the area of writing was lack of effort.
28 No behavior or health problems were noted. (Tr. 16, 136-39.)

1 Finally, Plaintiff's report card for the 2007-2008 school year
2 indicates by the third trimester, Plaintiff was meeting or working
3 towards his targets with assistance in the areas of reading,
4 writing, and math. (Tr. 132.) He was not failing any subject. His
5 third grade teacher noted "shows growth" and "satisfactory" effort
6 in reading development. (*Id.*)

7 The longitudinal school records, including the numerical
8 ratings in the Teacher's Questionnaire, are consistent with Dr.
9 McKnight's interpretation of the standardized test results and his
10 opinion that Plaintiff had problems in the Acquiring and Using
11 Information domain, but they were "less than marked" limitations.
12 The ALJ's finding of "less than marked" in this domain is supported
13 by substantial evidence.

14 **2. Attending and Completing Tasks Domain**

15 Regarding limitations in Plaintiff's Attending and Completing
16 Tasks domain, after summarizing the Regulations applicable to
17 Plaintiff's age group, ALJ Chester found less than marked
18 limitations based on Dr. McKnight's testimony, Plaintiff's mother's
19 testimony, and the school records. (Tr. 21.) In support of his
20 finding, the ALJ referenced Ms. Wuesthoff's comments in reports that
21 Plaintiff "fully capable of functioning" in a classroom setting, was
22 able to do the work but "lacked effort in writing," and was able to
23 do classroom math "with little if any support." (*Id.*, Tr. 114, 139,
24 140.) As discussed above, in 2007, Ms. Wuesthoff and Plaintiff's
25 second grade teacher rated "obvious problems" in five activities,
26 and one serious problem in "completing work accurately without
27 careless mistakes" in the Attending and Completing Tasks domain.
28 (Tr. 109.)

1 As is the case with the first domain findings, the longitudinal
2 record reflects problems with effort and staying on task. However,
3 it also shows improvement and satisfactory progress in the classroom
4 setting. (See, e.g., Tr. 132.) As noted by the ALJ and Dr.
5 McKnight, progressive improvement in his academics was noted in the
6 2008 IEP, the level of special education support was not increased
7 over the years, and his teacher reported he was fully capable of
8 functioning with the classroom. (Tr. 21, 37, 109, 114, 139.)
9 Plaintiff's school grades reflect satisfactory progress and his
10 report card indicates satisfactory effort in multiple subjects.
11 (Tr. 132.) The lack of failing grades or negative indicators in his
12 third grade report card is inconsistent with a finding of
13 disability. *Jamerson*, 112 F.3d at 1067. Plaintiff references no
14 evidence from a medical source or school personnel to support a
15 finding of marked limitations in the domain of Attending and
16 Completing Tasks.

17 **C. Other Source Evidence**

18 The assertion that Plaintiff's mother's testimony is sufficient
19 to support a finding of disability is without merit. The ALJ is
20 required to "consider observations by non-medical sources as to how
21 an impairment affects a claimant's ability to work." *Sprague*, 812
22 F.2d at 1232. Moreover, an ALJ is obligated to give reasons
23 "germane" to a lay witness's testimony before discounting it. *Stout*
24 *v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir.
25 2006). Although other source testimony may be used to show the
26 severity of an impairment, it can never establish disability absent
27 corroborating competent medical evidence. 20 C.F.R. § 416.913(a),
28 (d)(4); *Nguyen*, 100 F.3d at 1467; *Vincent v. Heckler*, 739 F.2d 1393,

1 1395 (9th Cir. 1984).

2 After summarizing claimant's mother's testimony, the ALJ
3 discounted her statements regarding the child's academic problems
4 and limitations in personal hygiene, noting reports from school
5 personnel or the child's treating physician do not support the
6 degree of limitations alleged by claimant's mother. (Tr. 18-19.) He
7 properly gave specific, germane reasons for rejecting the intensity
8 and limiting effects allegedly caused by the child's impairments.
9 *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009). For example,
10 the ALJ found school records show Plaintiff was improving in
11 reading, writing, and math and claimant's mother testified that the
12 child was improving academically. (Tr. 19, 37, 41, 43.) School
13 records discussed above show that the child was meeting academic and
14 work habit targets in several other subjects are consistent with the
15 ALJ's reasoning. Throughout the record, Plaintiff was observed as
16 "pleasant and cooperative," trying his best, able to focus on tasks,
17 capable of doing the work, and willing to ask for directions by test
18 administrators and teachers. (Tr. 19, 132, 138-40, 149-50, 152.)
19 Significantly, as noted by the ALJ, the records report no behavior
20 problems that impacted Plaintiff's learning. (Tr. 19.)

21 Regarding health problems, the ALJ noted claimant's mother
22 testified the child's stomach problems and absenteeism were related
23 to stress and grief caused by the recent death of the child's
24 grandfather. (Tr. 19, 46-48.) As reported by Ms. Meredith, the
25 child had started counseling for these issues. (Tr. 48.) The ALJ
26 properly considered claimant's mother's testimony in his evaluation
27 of the case and gave legally sufficient reasons for discounting
28 allegations that were inconsistent with other evidence in the record

1 and his determination of non-disability. (Tr. 19.)

2 **CONCLUSION**

3 Viewing the record in its entirety, Dr. McKnight's testimony is
4 consistent with standardized testing results, school records, and
5 observations by teachers. Because Dr. McKnight's opinions are
6 supported by substantial evidence and based on an evaluation of the
7 entire case, the ALJ did not err in his reliance on the medical
8 expert's opinions. The ALJ did not err in his consideration and
9 evaluation of other source testimony. The record reflects
10 substantial evidence to support the Commissioner's finding that
11 Plaintiff had not been disabled since the application date.
12 Accordingly,

13 **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
15 **DENIED.**

16 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is
17 **GRANTED.**

18 The District Court Executive is directed to file this Order and
19 provide a copy to counsel for Plaintiff and Defendant. The file
20 shall be **CLOSED** and judgment entered for **DEFENDANT.**

21 DATED April 5, 2011.

22
23 S/ CYNTHIA IMBROGNO
24 UNITED STATES MAGISTRATE JUDGE
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